APPENDIX "A"

In the United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

August 8, 1973

(Argued February 20, 1973)

Before

Hon. Robert A. Sprecher, Circuit Judge
Hon. Robert A. Grant, Senior District Judge*
Hon. Myron A. Gordon, District Judge**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 72-1752 & 72-1753 vs.

MICHAEL J. MARCHIO and
ALLEN B. NARDELLA,

Defendant-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 CR 1013
Philip W. Tone, Judge

* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

** District Judge Myron L. Gordon of the Eastern District of Wisconsin is sitting by designation.

ORDER

The appellants, Allen Nardella and Michael Marchio, were indicted for willfully transferring to Timothy C. Sack a machine gun, a Chinese Communist Type 56 Assault Rifle, 7.62 mm, without having obtained the prior approval of the Secretary of the Treasury or his delegate as required by 26 U.S.C. § 5812(a), in violation of 26 U.S.C. § 5861(e). Both were found guilty by a jury and the court below entered judgment in accordance with the jury's verdicts. Marchio was sentenced to six months in prison and thirty months probation. Nardella was placed on probation for a period of 35 months and ordered committed to the custody of the Attorney General for the first thirty days of the sentence.

Appellant Nardella's main argument is that he was entrapped by government agents. He contends that the crime was implanted in his mind by Fred Schwab, a paid informer for agents of the Alcohol, Tobacco and Firearms Division of the United States Department of the Treasury.

The facts surrounding the actual sale transaction are basically undisputed. Timothy Sack, an ATF agent working undercover, had gone to Schwab's home on July 24, 1971, to purchase the automatic rifle from Nardella. After agreeing upon a purchase price of $300.00, the parties went to Nardella's home in Joliet, Illinois, were Nardella produced the rifle and the sale was completed. One disputed fact concerned testimony by Agent Sack that when he dismantled the weapon for inspection, Nardella allegedly explained the absence of two pieces by stating that he didn't keep the two missing pieces in his house so that the "Alcohol, Tax agents couldn't get him."

The original contact with Nardella had been made by Schwab early in July of 1971. Schwab had gone to a

barber shop in Joliet where he engaged in a conversation with the barber about firearms. Schwab mentioned that he would like to purchase some guns and that he had a friend who collected machine guns. The barber told Schwab that he had a customer who might be interested in selling firearms. Schwab left his telephone number with the barber and asked him to give the number to the customer so that the customer might call Schwab.

The testimony concerning the remainder of the preliminary negotiations is conflicting. Schwab testified that a few days later his mother received a telephone call from someone named "Al" and that she took down a return number. He returned the call and talked with Nardella. Schwab testified that after some initial conversation concerning firearms in general, Nardella asked about Schwab's buddy who was interested in purchasing machine guns. Schwab told Nardella that his friend was interested in buying a machine gun and that he could afford to pay for good merchandise. According to Schwab, Nardella responded: "Well, if he's got the money I can load him up."

Nardella, on the other hand, testified that there was no discussion about automatic weapons during the first phone conversation and that Schwab phoned him four or five times before he, not Nardella, first inquired about automatic weapons. He further testified that it was only after Schwab had made numerous other pestering phone calls, as often as two times a night, requesting automatic weapons and contending that they were for a friend, that he agreed to try to find an automatic weapon for Schwab. He told Schwab that he had thought of someone he knew who might have an automatic weapon. The actual sale occurred a few days later.

Nardella also testified that he had not received any money for handling the transaction. However, Schwab

testified on rebuttal that at the time of the transfer Nardella informed them that he was making $50.00 for conducting the sale.

The government correctly argues that generally entrapment is an issue which should be determined by the jury and not by the court, citing *United States* v. *Lauchli,* 371 F.2d 303, 307-308 (7th Cir. 1966) and *United States* v. *Pingleton,* 458 F.2d 722, 724 (7th Cir. 1972). It also notes that the trial court was not obligated to accept the defendant's version of the facts when determining whether entrapment was established as a matter of law. *United States* v. *Brewbaker,* 454 F.2d 1360, 1361 (7th Cir. 1972). Finally, it asserts several factors as demonstrating a lack of entrapment: First, Schwab's testimony that Nardella initiated the telephone negotiations and was first to inquire about Schwab's friend who was interested in automatic weapons; secondly, testimony by both Agent Sack and Schwab that Nardella had received $50.00 for conducting the sale, with the money being payable by defendant Marchio and not the government; and thirdly, testimony again by both Sack and Schwab, concerning Nardella's claim that the automatic rifle was in mint condition.

We find, even without viewing the evidence in light most favorable to the government, that there was ample evidence disputing appellant's claim that he was entrapped. The entrapment issue was properly submitted to the jury. We remind appellant of the rule, cited by the government in its brief, that "[E]ntrapment is not established as a matter of law unless it is patently clear from the undisputed evidence that government agents originated the criminal design and implanted in the mind of an innocent person the disposition to commit the crime." *Pingleton, supra,* 458 F.2d at 724. In the instant case, the evidence is clearly disputed and, thus, does not even begin to approach this standard.

Appellant Nardella also argues that the trial court erred in refusing to permit him to answer a specific question as to his state of mind when he agreed to obtain the machine gun for the informer. In response, the government notes that the trial judge's ruling was not challenged and there was no offer of proof. More importantly, the government contends, and the transcript confirms, that on three other separate occasions defendant was asked why he agreed to obtain the weapon and, in each case, defendant explained that the only reason he agreed to sell the weapon to Agent Sack was because Schwab was pestering him. Any error by the trial court in not permitting Nardella to answer the one question was, at most, harmless error.

With reference to appellant's third argument, suffice to say that we find it totally without merit and, thus, not worthy of any discussion.

Appellant Marchio argues that the trial court erred in denying his repeated motions for severance. He notes that acts and statements of defendant Nardella were testified to and admitted against defendant Nardella, including testimony that Nardella had obtained the gun from a friend and that Nardella was to receive $50.00 for selling it. While conceding that his evidence was admitted solely against Nardella and that the jury was instructed throughout the trial not to consider the evidence against him, Marchio contends that the evidence was nevertheless clearly prejudicial to him.

Marchio alleges, however, that the "worst violation" of his right to a fair trial occurred when, after he had presented "a few very credible reputation witnesses," he rested his case, at which time the trial court ruled that he could no longer participate in the trial and that he would have no right of cross-examination. Upon the jury's

return to the courtroom, the court informed them that evidence to be offered by defendant Nardella was to be considered only as to him.

Marchio argues that the admonitions of the trial judge and the instructions given were insufficient to protect him from prejudice, citing *Bruton* v. *United States,* 391 U.S. 123 (1968) and *United States* v. *Heft,* 413 F.2d 1027 (7th Cir. 1969). He also suggests that his co-defendant's entrapment defense was antagonistic to his defense and, therefore, prejudicial to him. He concludes that he could have received a fair trial only if the trial court had granted his motion for severance.

The government argues that defendant Marchio was not prejudiced by the joint trial but instead benefited by it. In a separate trial, Nardella would have obviously testified, voluntarily or involuntarily via a grant of immunity, that he obtained the weapon from Marchio. It further suggests that Marchio was the "beneficiary of a windfall" in that the court's instructions to the jury to disregard the testimony of Nardella were not required. The government cites the following language of the Second Circuit in *United States* v. *Kahn,* 366 F.2d 259, 263 (2nd Cir. 1966), *cert. denied,* 385 U.S. 948:

> We find no merit in Pacelli's contention that because he rested his case and moved for acquittal at the close of the Government's case, the jury should have been instructed to consider as against him only the evidence adduced on the Government's case. The question of the sufficiency of the Government's case was a legal one; and once the trial court had decided that the Government's case was sufficient to go to the jury, we see no reason why the jury should not also have been free to consider the testimony of Pacelli's codefendants.

The government admits that in the *Kahn* case it is not clear whether Pacelli, like defendant Marchio in the case at bar, was not permitted to cross-examine his testifying codefendant. However, it argues that it makes no difference since Marchio made the choice to rest and before doing so the trial judge repeatedly informed his trial counsel that he was waiving the right to cross-examine all witnesses except those presented in rebuttal to his client's case, i.e., his character witnesses. The government concludes that, unlike *Bruton,* there was an opportunity to cross-examine the declarant but that defendant chose to foreclose the opportunity.

Regarding Marchio's claim that his codefendant's entrapment defense was antagonistic to his defense and thus prejudicial, the government argues that Marchio's presentation of good character evidence is not inconsistent with Nardella's factual concession that he obtained the weapon from Marchio.

We concede that Nardella's entrapment defense was inconsistent and somewhat antagonistic to defendant Marchio's defense, the latter consisting of a not guilty plea and the presentation of character witnesses. However, the record contains other substantial, independent evidence that Marchio had sold the weapon to Agent Sack through Nardella. In the government's case in chief, a second ATF agent, Andrew Vita, testified that on August 17, 1971, approximately three weeks after the incident charged in the indictment, he and informer Schwab met Marchio at his home. Upon entering the home, Vita was asked by Marchio if he was an I.B.I. agent (apparently Illinois Bureau of Investigation). Marchio insisted that Vita hand over his wallet so Marchio could check his identification. Marchio then asked Agent Vita if he was the man interested in buying a gun. Vita replied

that he might be interested depending on what Marchio had to sell. Marchio informed Vita that he had an M-14, E-2 machine gun which he would sell for $450.00. Vita complained that the price was high. Marchio assured him that it was in excellent condition and then asked Vita if he had seen his (Marchio's) AK, the one that Vita's friend had bought. Schwab explained that Marchio was referring to Tim. Record at 214. Agent Vita further testified as follows:

> Mr. Marchio then added that he had given it to a friend to sell for $50.
>
> And then I said, 'That was your weapon?' And he stated that it was. Record at 214-215.

The law regarding severance of defendants is clear. Severance is discretionary with the trial court and its decision will be set aside only upon a showing of a clear abuse of discretion. *United States* v. *Kahn,* 381 F.2d 824, 838 (7th Cir. 1967), *cert. denied,* 389 U.S. 1015; *United States* v. *Tanner,* 471 F.2d 128, 137 (7th Cir. 1972), *cert. denied,* —— U.S. ——. Moreover, as stated in *Tanner,*

> [A] defendant bears the burden of demonstrating that he has been prejudiced by the joinder; that burden is a difficult one. "The defendant must show something more than the fact that 'a separate trial might offer him a better chance of acquittal.' " *Tillman* v. *United States,* 406 F.2d at 935.
> *Ibid.*

In the case at bar, the additional independent evidence described above precludes any contention by Marchio that he was prejudiced by Nardella's testimony that he obtained the weapon from Marchio. Nardella's testimony merely corroborates Marchio's admission that it was his

AK-47 that Agent Tim Sack had purchased from Nardella. While Marchio statements to Agent Vita may not have been as direct as possible, we fail to understand, in view of all the testimony, how the statements could have been interpreted as anything but a definite admission by Marchio that he provided the machine gun which Agent Sack purchased from Nardella.

Nor are we troubled by the fact that Marchio's counsel did not cross-examine defendant Nardella. Marchio insisted on resting his case prior to the presentation of Nardella's defense despite repeated warnings from the trial judge that, if he rested, he would be waiving the right to cross-examine any witnesses defendant Nardella might present, including Nardella himself. We agree that Marchio thereby waived the opportunity to cross-examine defendant Nardella. Marchio indicated in his pre-trial motion for severance that he believed that his codefendant would present an entrapment defense, a defense which would require Nardella to admit the offense charged in the indictment. *United States* v. *Georgiou,* 333 F.2d 440 (7th Cir. 1964), *cert. denied,* 379 U.S. 901; *United States* v. *Johnston,* 426 F.2d 112, 114 (7th Cir. 1970). Under the circumstances we know of no reason why Marchio should not be bound by the clear consequences of his decision to rest, i.e., the loss of the right to cross-examine. In effect, his decision to rest constituted a decision not to cross-examine defendant Nardella if and when he testified. See *United States* v. *Holmes,* 452 F.2d 249, 269 (7th Cir. 1971), *cert. denied,* 405 U.S. 1016 (1972).

Because of Marchio's admission to Agent Vita that he provided the AK-47 which defendant Nardella transferred to Agent Sack, we find without merit Marchio's second argument that there was insufficient evidence to convict him.

Finally, defendant Marchio argues that the trial court erred in admitting evidence of the attempted sale of the M-14, E-2 machine gun to Agent Vita and a sale by Marchio of another M-14 machine gun to Thomas Weinhold, both events having occurred within a few weeks of the charged offense. The evidence was admitted as being probative of Marchio's intent. Noting that the crime charged does not require proof of specific intent, *United States* v. *Freed,* 401 U.S. 601, 607 (1971), defendant contends that the evidence of subsequent similar criminal acts should not have been admitted.

We disagree. First, it is well established that evidence of both prior and subsequent similar criminal acts is admissible to prove intent. *United States* v. *Marine,* 413 F.2d 214, 216-217 (7th Cir. 1969), *cert. denied,* 396 U.S. 1001 (1970). Secondly, defendant overlooks the fact that the jury was instructed that in order to find defendant Marchio guilty they would have to find that he "gave the described firearm to defendant Nardella *with the specific intent* to accomplish that transfer of the described firearm by defendant Nardella . . . ." (Our emphasis.) Record at 582. Of course, defendant Marchio did not object to the instruction and the burden it imposed on the government Also, as noted by the government, defendant's entire defense, to the effect that he was a reputable law abiding citizen who would be unlikely to intentionally violate the law, further stressed the issue of intent. Under these circumstances, the evidence of subsequent similar criminal acts certainly had legitimate probative value which would outweigh any possible prejudicial effect. *United States* v. *Borkenhagen,* 468 F.2d 43, 48 (7th Cir. 1972). We hold that the evidence was properly admitted by the trial court.

The convictions of the defendants are AFFIRMED.

APPENDIX "B"

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 6, 1973.

Before

Hon. Robert A. Sprecher, Circuit Judge
Hon. Robert A. Grant, Sr. District Judge
Hon. Myron L. Gordon, District Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 72-1752 vs.

MICHAEL J. MARCHIO,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(71 CR 1013)

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.